No. 91-1093

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORMAN BOSEK,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Illinois Appellate Court, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the jury instructions given violated Bosek's constitutional rights to due process and trial by jury where the instructions failed to advise the jury of the presumption of innocence and proper burden of proof as to the offense of second degree murder and conflicted with precedent of this Court as to instructions which shift to the defendant the burden of proof as to mitigating factors.

II. Whether Bosek's rights to due process and trial by jury were violated when, in a prosecution for murder in which a defense of self-defense was raised, the trial court refused to instruct the jury on the theory of defense relating to the decedent's prior violent and aggressive behavior.

III. Whether the State failed to eliminate all reasonable doubt of Bosek's guilt.

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The parties before the Supreme Court and the parties below are identical except that the Illinois Attorney General was not a party to proceedings in the Illinois Appellate Court. Mr. Bosek was represented by other counsel at trial. In the appellate proceedings below, Mr. Bosek was represented by Mr. Lynch alone.

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OPINIONS BELOW

The Illinois Appellate Court for the Second District affirmed Bosek's conviction, in an opinion reported at 210 Ill. App. 3d 573, 569 N.E. 2d 551 (1991). The Illinois Supreme Court denied Bosek's petition for leave to appeal, in an order not yet published (A. 40). These opinions are reproduced in the appendix.

JURISDICTION

The opinion of the Illinois Appellate Court was filed on March 18, 1991. No petition for rehearing was filed. A timely petition for leave to appeal was filed in the Illinois Supreme Court on April 22, 1991. The petition for leave to appeal was denied, in an order entered on October 2, 1991.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), and this petition is timely, under Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V:

> "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . ."

U.S. Const. amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury . . ."

U.S. Const. amend. XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

Ill. Rev. Stat. ch. 38, § 7-1 (1987):

> "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend him-

self or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony."

Ill. Rev. Stat. ch. 38, § 9-1(a) (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987):

"A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another . . ."

Ill. Rev. Stat. ch. 38, § 9-2 (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987):

"(a) A person commits the offense of second degree murder when he commits the offense of first degree murder as defined in paragraphs (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present . . .

(2) At the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable . . .

(c) When a defendant is on trial for first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty

of second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of this Code. In a jury trial for first degree murder in which evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented and the defendant has requested that the jury be given the option of finding the defendant guilty of second degree murder, the jury must be instructed that it may not consider whether the defendant has met his burden of proof with regard to second degree murder until and unless it has first determined that the State has proven beyond a reasonable doubt each of the elements of first degree murder."

STATEMENT OF THE CASE

Petitioner, Norman Bosek, is a mechanical engineer. He was employed at the Fermi National Accelerator Laboratory for over eleven years. Bosek had been continually employed since he graduated, from the University of Illinois, in 1963. He was the sole support of his family (C. 941-43). Co-workers and supervisors attested to his responsibility and excellent work performance (C. 1281-86). Bosek had no criminal record (C. 1293).

Bosek was married in 1962. He and his wife, Janice, had five children, ages 24 through 11. Mr. and Mrs. Bosek lived together from that time until November 21, 1988 (C. 941-42, 944). Mrs. Bosek did not work outside the home (C. 539). The family moved to Wayne, Illinois in

mid-1988 (C. 943). Wayne is a small, rural area in DuPage County, Illinois.

Michael, the Boseks' eldest son, introduced Lucien Gilbert to his parents in January 1988 (C. 495-96, 944-45). Thereafter, Bosek saw Gilbert several times (C. 945-47).

In August 1988, Bosek found Gilbert at the Bosek home, shooting a .357 Magnum in the backyard. While Gilbert stopped at Bosek's request, Bosek learned that Gilbert had been there shooting three or four days earlier (C. 947-48).

Gilbert made a practice of carrying the .357 Magnum. Although he was not authorized to do so, Gilbert routinely kept the .357 Magnum with him while on duty as a security guard (C. 1067-68, 1071-72, 1077-78). He would set booby traps in the areas he was guarding, a practice which was neither authorized nor customary (C. 1068-69). Gilbert was ultimately fired, as a result of this behavior, death threats Gilbert made against a customer of the security firm, and his use of alcohol while working (C. 1067, 1072-74). Gilbert was a very heavy drinker (C. 558-59, 1053). When he drank, he had a bad temper (C. 1058-59).

When Bosek saw Gilbert, Gilbert was typically dressed in combat boots, with khaki pants, and a bandanna around his head. Gilbert also carried a hunting knife, with a 12-inch blade (C. 948-49, 1104). Gilbert was known, to coworkers, and Mrs. Bosek, by the nickname "Rambo" (C. 563, 1087).

On Friday, September 16, 1988, Mrs. Bosek told her husband that she wanted to marry Gilbert (C. 949-50). Mrs. Bosek and Gilbert had been having an affair for several months, unbeknown to Bosek (C. 571-73, 575). Bosek attempted to save the marriage; he talked to his

wife about it all weekend, he asked her to see a priest, and he began trying to be especially nice to his wife (C. 587, 600-01, 950-52, 956-57). After that weekend, Mrs. Bosek began to have mixed emotions about the affair (C. 589).

The following Monday, September 19, 1988, Bosek received a call at work from Gilbert. Gilbert told Bosek that there was nothing Bosek could do about the affair, and that the two men would have to settle it between them. Gilbert stated: "we can settle it with guns or knives and . . . we are going to settle it with guns. We are going to have a 'shoot-out at the OK Corral'. . . . "I am coming to get you" (C. 953-54).

Bosek hung up the phone and immediately reported this threat to Wayne police (C. 816-19, 953-54, Def. Ex 31). The officer who took the complaint testified that, at that time, Bosek expressed fear that Gilbert might be at the Bosek home that night and that there might be an altercation (C. 818-19).

Nothing occurred that night. However, after the call, Bosek began keeping a loaded .38 revolver in his dresser drawer (C. 955).

Two and a half weeks later, Gilbert called Bosek at home. Gilbert said that he had fought in Vietnam and was not going to be pushed around by anyone. Gilbert told Bosek that he was going to come and get Bosek (C. 958-59). Bosek called the Wayne police. Receiving no answer, as the number he dialed was not a 24-hour number, Bosek went to the Wayne police station, but no one was there. There was a sign on the door, which gave a number to call after 5:00 p.m. Bosek wrote that number down and returned home (C. 958-59). In the interim, Mrs. Bosek, who knew of the call, telephoned Gilbert and told him not

to come (C. 605, 959). Mrs. Bosek told her husband of this when he returned, and Gilbert did not come over that day (C. 959-60). Bosek got his gun, put it in his pocket, and walked around the house with it for a while. He took no other action (C. 959).

Gilbert called Bosek again in October 1988. During that conversation, Gilbert told Bosek that he had killed in Vietnam and could do it again. Gilbert told Bosek that he was coming to get Bosek and that he, Gilbert, had his gun loaded. Bosek hung up; the call made him nervous (C. 961).

Gilbert called frequently after that; each time, once he knew it was Gilbert, Bosek hung up the phone (C. 960-61).

Gilbert wrote Mrs. Bosek many letters (C. 506). In one letter, Gilbert told Mrs. Bosek to "tell Norman I'm going to be there" (Def. Ex. 30). In another letter, Gilbert stated that he had been cut off in traffic. Gilbert indicated that he wanted to give the other driver "a first class face lift", and track him down and beat him (C. 616-18; Def. Ex. 21). Following a disagreement with Mrs. Bosek's brother, Phil Rysinka, Gilbert wrote that Gilbert would "rip (Rysinka's) lips off" and show Rysinka "what it's like to spill blood, because I have gone through gallons" (C. 620-21; Def. Ex. 22).

Mrs. Bosek continued her affair with Gilbert (C. 610-11, 962-63).

On November 8, 1988, Gilbert wrote a letter to the Boseks' 24-year old son Michael, asking Michael to get certain documents which Gilbert wanted to have to use against Bosek in contemplated divorce proceedings between the Boseks (C. 608-10, Def. Ex. 23). Michael did not respond (C. 1105).

Thereafter, Gilbert called Michael at work and demanded the records. Michael was angry and afraid (C. 1106-09).

Gilbert wrote another letter, which Michael received on November 19, 1988. Michael was so upset by this letter that he telephoned his father, who was at a party at a friend's home, and told Bosek that he was afraid (C. 973-74, 1089, 1092, 1109-11). The next day, Sunday, November 20, Michael showed the letter to his parents (C. 1111-12). Bosek read the letter (C. 975). In the letter, Gilbert told Michael:

> "Michael, you declared war on me . . . I have enough firepower to wipe out 20 people with one flick of the wrist. Don't think for a second I won't use it . . . I had to kill people for real and I'm not going to be intimidated by some 23-year old punk who doesn't know what it's like to cut another man's throat or blow off another man's head . . . Come and get me . . . You (i.e. Michael, Rysinka and Bosek) should join forces and come after me. I need a good excuse to go on a killing rampage again and you guys could provide me with that opportunity . . . The consequences could be fatal . . . I'll send you a hand grenade just to even things up . . ." (Def. Ex. 26).

Bosek told his son that they would take the letter to Bosek's attorney (C. 977, 1113). Bosek decided to go to the attorney, rather than the police, as nothing had happened when he reported the prior threats to police (C. 977).

The next morning, November 21, 1988, Bosek went to work (C. 977).

At 10:30 a.m., Gilbert went to the Bosek home. Mrs. Bosek let him in. Gilbert was wearing a holster with a gun in it (C. 510, 513). Gilbert was drinking beer out of a Tupperware container (C. 559-60).

Gilbert showed Mrs. Bosek a rifle (C. 513). This rifle was an AK-47, an extremely powerful semi-automatic weapon (C. 873, 886-88, 897). Gilbert bought this weapon, and 90 rounds of ammunition, on November 13, 1988 (C. 937). The gun's magazine held 30 cartridges (C. 873-74). An AK-47 is capable of being converted to a fully automatic weapon; when so converted, the weapon can discharge 30 rounds of ammunition in less than three seconds (C. 885-86). Although this particular AK-47 was in a semi-automatic mode (C. 873-74), a person standing several feet away would have no way of knowing whether the rifle was fully automatic or not (C. 886).

Mrs. Bosek and Gilbert left the house in Gilbert's car, a Chevette hatchback (C. 164, 389-90, 514). They went to the Pratt Wayne forest preserve, arriving about 11:30 a.m. (C. 516-17). They sat in the car for a time (C. 519).

Bosek came home for lunch at about 11:30 a.m. Finding no one home, he drove to the store and then the post office, thinking that he wife might have gone shopping or to get the mail (C. 977-78). When he did not find his wife, Bosek figured that she was either with her sister or with Gilbert. He was concerned that, if she were with Gilbert, Gilbert might be at the home when Bosek returned (C. 979-80). As he feared a confrontation with Gilbert, Bosek put his gun in a compartment in the driver's side door of his car, so it would be accessible to him (C. 979-82).

Bosek left the house around noon and went to look for his wife. At that time, he did not know where she was. He drove past a couple of restaurants, where he thought she might be if she were with her sister (C. 982-83).

He then drove into the Pratt Wayne Forest Preserve. As he entered, he saw Gilbert's car. Gilbert was in the

driver's seat. Mrs. Bosek was sitting next to him (C. 983-86). This was about 12:20 p.m. (C. 519).

Mrs. Bosek saw Bosek approaching. She said to Gilbert "there's Norm" (C. 519-20).

Bosek saw Gilbert look at him (C. 985-86). Gilbert immediately got out of his car and proceeded to the back of it (C. 520, 727, 986). Mrs. Bosek, who assumed that the AK-47 and the .357 Magnum were in the car, said as Gilbert got out, "don't shoot Norm" (C. 728).

Bosek pulled up behind the Chevette (C. 521, 986). He attempted to roll his window down, to call his wife and take her home. As the window stuck, he opened the door, got out, and called to his wife. Mrs. Bosek was still in Gilbert's car (C. 986). She indicted that she remained in the Chevette for a while and that she heard voices. She could not understand what was being said (C. 521).

Bosek testified that, at this point, Gilbert had opened the hatchback of his car and was holding the AK-47 (C. 987). Gilbert's back was to Bosek, but Bosek saw the AK-47, with the clip in it, and Bosek saw Gilbert moving some lever on the gun (C. 987-89). Seeing the clip and considering Gilbert's weapon to be a machine gun, Bosek got out his gun and shot at Gilbert as fast as he could (C. 989). About three seconds passed between the time Bosek saw Gilbert with the gun in his hands and the time he shot Gilbert (C. 989). Bosek testified that Gilbert fell back, with his arms at his sides and the rifle across his knees (C. 990).

Bosek watched Gilbert for a few seconds and he was not doing anything. Then Bosek was distracted by his wife, who had exited the Chevette, and was running around screaming (C. 990-91).

Bosek testified that his attention was then drawn back to Gilbert. He saw Gilbert move his right hand toward the rifle. Bosek then shot Gilbert again (C. 991). Fifteen to thirty seconds passed between the first shot and the second shots (C. 173, 398-400, 424-25, 528). As he saw no indication that Gilbert had been hit, Bosek retreated behind his car (C. 991).

Mrs. Bosek stated that, when she got out of the Chevette, she saw Bosek standing near his car, a Lincoln Continental, with the gun in his hand. The hatchback of the Chevette was raised, and Gilbert was leaning into the hatchback (C. 522, 740). According to Mrs. Bosek, Bosek first pointed the gun at her, then moved and pointed it at Gilbert (C. 523). She did not tell this to police (C. 732-33). At the time of the first shot, the hatchback was open and Gilbert was leaning into it (C. 740). While Mrs. Bosek said that she did not see a weapon, she could not see Gilbert's hands. She was watching Bosek, not Gilbert (C. 740).

After the first shot, Mrs. Bosek ran to a nearby car to get help (C. 526). She did not see a rifle at that time. However, she did see the rifle over Gilbert's legs below his knees, when she returned (C. 529-31).

Mrs. Bosek had not seen Gilbert move prior to the second two shots (C. 525-26, 528). However, she had gone to several cars in an unsuccessful attempt to get help (C. 529-30).

Mrs. Bosek indicated that, when she saw the rifle over Gilbert's legs, she moved it, trying to get it off of his legs. However, as it was heavy, she was only able to move it a little way (C. 530-31, 743). Mrs. Bosek also moved Gilbert's right arm (C. 742-43, 747).

Other people were in the area at the time. The first thing Kristian Johnson noticed was a cracking sound (C. 163-66, 179-80). He then saw Gilbert lying on his back behind the Chevette and Bosek, with a gun in his hand, standing nearby (C. 167). At that time, Johnson did not see anything in Gilbert's hands or on the ground (C. 168-69). Johnson saw Bosek lower his arm and heard 3-4 more shots (C. 171). Johnson had not seen Gilbert move (C. 173). However, Johnson was concerned for his own safety; after hearing the first gunshot, began to quickly leave the area. He was not looking around (C. 171, 182-83). As Johnson drove away, the Lincoln Continental was between him and the two other men (C. 184).

Brenda Cash was with Gary Smythe, in Smythe's car. They were parked 50-75 feet from the Chevette (C. 389-90, 422-24).

Cash and Smythe were talking (C. 424). Cash saw Gilbert exit his vehicle and go to the back of it. She did not see anything in his hands. She saw Bosek with a gun, standing outside of his car. Cash heard arguing (C. 393-96). Cash then began looking at Smythe (C. 398). She did not tell him anything about a gun (C. 412, 437-38). Cash heard a pop and looked back. Cash saw Bosek with his gun pointed down. She could no longer see Gilbert. She heard two more pops (C. 398-400). As Smythe drove away, Cash did not see a weapon near Gilbert (C. 400-02). However, she did not notice that the hatchback was up (C. 410). Cash was not looking at the scene at the time of the first pop. When Cash heard the other two pops, she could not see Gilbert at all (C. 411-13). She also was scared (C. 414).

Smythe heard the shots, but he did not witness the shooting (C. 424-25, 438-39). As he drove away, Smythe saw that the hatchback was raised (C. 441-42).

Johnson and Smythe drove to the ranger's station, a quarter mile away, and reported the incident (C. 174, 416, 427, 430). When they returned to the parking lot, Johnson, Cash, and Smythe noticed the rifle lying across Gilbert's legs (C. 175-76, 403, 432).

After the shooting, Bosek stayed behind his car for about ten seconds. He then asked his wife to go with him to the police station (C. 532, 744, 992). She refused. Bosek, thinking that something should be done quickly, got into his car and began driving toward the Wayne police station, which was nearby (C. 745, 992).

Upon leaving the forest preserve, Bosek saw a police car. He stopped, got out, and told the officer, Officer Read, that he had just shot a person. Bosek told Read that the man might still be alive and to call an ambulance. Bosek led Officer Read back to the parking lot (C. 773-75, 992-94).

Both Officer Read, and paramedics, who were dispatched at 12:29 p.m., saw Gilbert lying on the ground, with his feet near the rear of the hatchback, and a rifle across his legs (C. 447, 776-77). Read stated that the rifle was about three inches above Gilbert's ankles (C. 780). The paramedic testified that the gun was midway between Gilbert's knee and ankle, with the butt of the gun to his right (C. 448).

Read took the rifle and placed it in the hatchback (C. 784-85). The hatchback was open, and a revolver was also there (C. 456, 779; *see* C. 480).

According to investigating officers, when questioned at the scene, Bosek told police that the incident was not an accident (C. 482). One officer, who was walking past another officer who was questioning Bosek, stated that he

heard Bosek say he intended to do something like this (C. 829). The officer questioning Bosek, however, testified that, although Bosek said something, he could not hear what it was (C. 482). At the station, Bosek told police that Gilbert had threatened his son and that if he, Bosek, "would have waited a couple seconds longer, (he) would be the one lying on the ground" (C. 489).

Gilbert died due to the second set of gunshot wounds (C. 695, 700-01, 704). The first wound would not have caused death (C. 666, 705). Gilbert's blood alcohol content was found to be .22, over twice the level at which, in Illinois, intoxication is presumed (C. 702-03 706).

The first shot hit Gilbert's spinal cord (C. 653-56, 694, 697-99). It would have paralyzed him from mid-chest down (C. 660). However, Gilbert would have retained the use of his arms (C. 669). While he would not have actually been able to reach a rifle between his knees and ankles (C. 666), if he reached the rifle, he could have used it (C. 673). Further, an observer would not have had any idea of the nature and extent of the injury (C. 670).

Bosek was charged with first degree murder (C. 3-6), *i.e.* an intentional homicide, without justification. Ill. Rev. Stat. ch. 38, § 9-1 (a) (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987). Following a jury trial, Bosek was convicted of second degree murder (C. 80), a killing performed under an unreasonable belief that the action is justified as self-defense. Ill. Rev. Stat. ch. 38, § 9-2 (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987).

Bosek's trial attorney tendered a jury instruction that evidence of Gilbert's violent and aggressive character could be considered, along with the other facts, to show who was the aggressor. The trial court refused this instruction, as it was not a pattern instruction, Illinois Pat-

tern Jury Instructions (IPI), Criminal (2nd ed. 1981), and as it singled out one aspect of the case (C. 1131-33). The jury was instructed, over defense objection, as to the use of force by an aggressor (C. 74-75, 1128-31). Trial counsel also preserved issues as to the sufficiency of the evidence (C. 127, 1160-61).

Substitute counsel appeared for Mr. Bosek in the trial court and presented, with leave of court, further post-trial motions (C. 129-38), which raised additional issues as to the trial court's failure to instruct the jury on the State's burden of proof, and the presumption of innocence, on second degree murder (Supp. Rec. C. 1, 4-5).

Bosek's post-trial motions were denied. He appealed (C. 155), raising the above issues, and others, including ineffective assistance of counsel.

The Illinois Appellate Court for the Second District affirmed. The appellate court rejected Bosek's reasonable doubt argument on the theory that the State's evidence, if believed, established that Gilbert was not going to fire his rifle or that, even if he wished to, he was unable to fire it (Appendix ("A.") 31). The appellate court rejected Bosek's argument that the jury should have been instructed on his theory of defense, on the same grounds as the trial court (A. 32-33).

Given trial counsel's failure to otherwise object to the instructions, the appellate court found the issue as to the propriety of the instruction on second degree murder waived. However, before reaching that conclusion, the appellate court considered whether or not the jury was properly instructed (A. 27-30). This analysis was required by the Illinois plain error rule, under which errors not properly preserved at trial are not waived if they are plain errors affecting substantial rights. Illinois Supreme Court Rule 615 (a); *see* Supreme Court Rule 451 (c).

The Court concluded that, because the jury was advised of the presumption of innocence and burden of proof as to first degree murder, no similar instructions were required as to second degree murder (A. 29). The court noted that the jury was supposed to find the defendant guilty of first degree murder before considering whether he was guilty of second degree murder (A. 29). The appellate court also noted the statutory provision that the burden of proof remained upon the State to show a lack of justification (A. 29).

Bosek filed a petition for leave to appeal to the Illinois Supreme Court, raising each of the above issues. That petition was denied, without opinion (A. 40).

Bosek seeks a writ of *certiorari* from this Court.

REASONS FOR GRANTING THE WRIT

I.

The jury instructions given violated Bosek's constitutional rights to due process and trial by jury where the instructions failed to advise the jury of the presumption of innocence and proper burden of proof as to the offense of second degree murder and conflicted with precedent of this Court as to instructions which shift to the defendant the burden of proof as to mitigating factors.

The presumption of innocence is a basic component of a fair trial, the enforcement of which lies at the foundation of our judicial system. *Taylor v. Kentucky*, 436 U.S. 478, 479, 483 (1978); *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Coffin v. United States*, 156 U.S. 432, 453 (1895).

A jury must be instructed on the presumption of innocence, in order to insure that the jury is apprised of the importance of the defendant's right to have his or her guilt determined solely on the basis of the evidence presented at trial. *Taylor*, 436 U.S. at 484-86. The instruction provides the lay juror with important guidance, by cautioning the juror to disregard all of the suspicion which arises from the charges against the defendant. *Taylor*, 436 U.S. at 484.

An instruction on the presumption of innocence is required even where the jury is instructed that the prosecution bears the burden of proving the elements of the offense beyond a reasonable doubt. *Taylor*, 436 U.S. at 488-89; *Coffin*, 156 U.S. 432, 155 S.Ct. 394, 402-03. This is because the presumption of innocence serves the unique function of requiring an acquittal of the defendant, unless the prosecution meets its burden of proof. *See Coffin*, 155 S.Ct. at 404.

It is also axiomatic that, in order to obtain a conviction, the prosecution must prove each and every element of the offense, beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). This fundamental rule, constitutionally required by due process guarantees, is the primary safeguard for reducing the risk of an erroneous conviction. *Cage v. Louisiana*, 111 S.Ct. 328, 329 (1990); *Winship*, 397 U.S. at 363. The reasonable doubt standard provides concrete substance for the presumption of innocence, the bedrock principle of our jurisprudence. *Winship*, 397 U.S. at 363.

In this case, the jury was instructed as to the elements of first and second degree murder (A. 44-45). The jurors were told that the State had the burden of proving first degree murder and that, if the State met this burden,

Bosek would have the burden of proving, by a preponderance of the evidence, the presence of a mitigating factor (A. 42). The instructions informed the jurors that they could return a verdict of not guilty, guilty of first degree murder, or guilty of second degree murder (A. 43). The instructions advised the jury that Bosek was presumed to be innocent of the charge of first degree murder (A. 42; C. 1253). The jury was never instructed that the presumption of innocence also applied to the offense of second degree murder (C. 1249-61).

While reversal is not automatically required in every case in which an instruction on the presumption of innocence is omitted, the omission of such an instruction may well warrant reversal, depending on the totality of the circumstances. *Kentucky v. Whorton*, 441 U.S. 786, 789-90 (1979). These circumstances include the instructions given, the arguments made, the weight of the evidence presented, and other relevant factors. *Whorton*, 441 U.S. at 789. Several members of the Court have concluded that an instruction on the presumption of innocence is constitutionally required in every case. *Whorton*, 441 U.S. at 791 (Stewart, Brennan, Marshall, J.J., dissenting). The importance of such an instruction remains clear. *See Taylor*, 436 U.S. 478.

In this case, a separate instruction on the presumption of innocence as to the offense of second degree murder was necessary to ensure that Bosek received a fair trial.

The evidence against Bosek was far from overwhelming. Under Illinois law, the difference between a homicide justified by self-defense, and warranting acquittal, and second degree murder depended upon the reasonableness of the defendant's belief, based on the circumstances confronting the defendant at the time, that his conduct was

necessary for his own safety. *See* Ill. Rev. Stat. ch. 38, § 7-1, 9-1 (a), 9-2 (a) (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987); *see People v. Scott*, 97 Ill. App.3d 899, 902-03, 424 N.E.2d 70 (1981). That was the pivotal issue here. Bosek shot a man who had threatened him and his son several times. Gilbert routinely carried weapons. Before the first shot was fired, Gilbert had seen Bosek approaching, jumped out of his car, and was reaching into the open hatchback of his vehicle. In that area, in addition to a .357 Magnum, Gilbert had a loaded AK-47. Bosek testified that he saw Gilbert with the AK-47 before he fired the first shot. Bosek testified that he fired the second shot, seconds later, after seeing Gilbert reach for the AK-47 which was on Gilbert's legs. Medical testimony indicated that Gilbert was capable of moving his arms. This powerful weapon was seen, and moved further down Gilbert's legs, by Mrs. Bosek when she returned to the area seconds later, and seen by police and paramedics. Even assuming, *arguendo*, that this evidence could be considered sufficient, it is far from overwhelming.

The jury was not instructed as to the presumption of innocence for the offense of second degree murder. However, the fact that the jury was expressly instructed that the defendant was presumed innocent of first degree murder may well have suggested to the jurors that this same presumption did not apply to the offense of second degree murder. Thus, this is not simply a case in which an instruction on the presumption of innocence was omitted, but rather one in which the instructions given may well have misled the jurors into believing that the presumption did not exist.

The arguments exacerbated the problem. The prosecutor's argument focused, in large part, upon the credibility of Bosek's testimony that Gilbert moved, prior to the sec-

ond set of shots. The prosecutor asserted that Bosek was lying, that he could have put the rifle on Gilbert's legs himself, and that Gilbert was incapable of moving after the first shot. The prosecutor also asserted that any motion by Gilbert was not sufficient to justify Bosek in shooting him a second time (C. 1183-84, 1187, 1195-200). The defense countered by arguing that Bosek's conduct was reasonable self-defense (C. 1202, 1226-30).

The issue here is not whether or not the prosecutor's arguments were improper; rather, the issue is the impact of the arguments and the corresponding importance of an instruction on the presumption of innocence. *Taylor v. Kentucky*, 436 U.S. 478, 487 n. 14 (1978). The focus of the arguments, particularly the prosecutor's, suggested that Bosek had to establish his innocence, and that the jury could convict him if he had not done so. Therefore, an instruction on the presumption of innocence was necessary to insure that Bosek received a fair trial. *Taylor*, 436 U.S. at 486-90.

The instructions given were also constitutionally defective in the way in which they shifted the burden of proof to the defense. Given the fundamental nature of the requirement that the prosecution bear the burden of proving guilt beyond a reasonable doubt, this Court has rejected, as violative of due process and the right to a jury trial, instructions which tend to reduce the prosecution's burden of proof. *Cage v. Louisiana*, 111 S.Ct. 328 (1990); *Carella v. California*, 491 U.S. 263 (1989); *Cool v. United States*, 409 U.S. 100 (1972). The critical issue is not how a reviewing court would interpret the instructions, but rather how a reasonable juror might have interpreted the instructions as a whole. *Cage*, 111 S.Ct. at 329-30; *Francis v. Franklin*, 471 U.S. 307, 316 (1985). Constitutional error arises if the jury might have understood the instructions to either

create a presumption or to shift the burden of persuasion on an element of the offense. *Carella*, 109 S.Ct. at 2421; *Francis*, 471 U.S. 307; *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The instructions here advised the jury of the elements the State was required to prove to obtain a conviction for first degree murder. They then advised the jury that, if it found those elements were proven, to continue deliberating, to determine whether a mitigating factor had been proven, such that Bosek was guilty of the lesser offense of second degree murder. The jurors were told that the State's burden was one of proof beyond a reasonable doubt. The instructions then advised the jurors that the defendant had the burden of proving, by a preponderance of the evidence, the existence of a mitigating factor (A. 44-45).

With regard to the contested element, of justification, the jurors were instructed:

1) that a lack of justification was an element of the State's proof (A. 44);

2) that the mitigating factor, which Bosek was required to prove by a preponderance of the evidence, was that he believed that the circumstances justified the deadly force he used, but that his belief was unreasonable (A. 44-45).

The jury was also given a definition of the justifiable use of force and instructed at some length on the lack of justification for the use of force by an aggressor, or someone who provokes the use of force against himself (C. 74-76). Illinois Pattern Jury Instructions (IPI), Criminal Nos. 24-25.06, 24-25.09, 24-25.11 (2d ed. 1981).

The standard of preponderance of the evidence was defined for the jurors; reasonable doubt was not (C. 70). IPI Criminal No. 4.18 (2d ed. 1981, 1987 Supp.).

The error in these instructions is that they did not clearly guide the jury on what standard to employ in assessing the reasonableness of Bosek's belief that his action was justified.

As noted above, this was the pivotal issue in this case. The jury clearly found that Bosek believed that he was in danger.

However, the jurors were basically told that, once having found that Bosek had that belief, they had to convict him of second degree murder, if they found that his belief was unreasonable (A. 44-45). The jurors were never clearly told what to do if they had a doubt as to the reasonableness of his belief or how to evaluate evidence concerning his belief. *See Martin v. Ohio*, 480 U.S. 228, 238-40 (1987) (Powell, Brennan, Marshall, Blackmun, J.J., dissenting). Evidence which might suffice to create a reasonable doubt on the elements of the State's case may fall short of proving an affirmative defense by a preponderance of the evidence. *See Martin v. Ohio*, 480 U.S. 228, 234 (1987). Such evidence, however, warrants acquittal, under the principle that the State must prove its case beyond a reasonable doubt as to each element of the crime charged.

Under the instructions given to this jury, once having reached the issue of second degree murder, the jury had only two options, to convict Bosek of first degree murder or to convict him of second degree murder. The jurors were not clearly given the constitutionally required alternative of acquitting Bosek if they had a doubt as to the reasonableness of his belief, or if they disagreed on the reasonableness of his belief.

By thus failing to afford the defendant the full benefit of the presumption of innocence, the instructions here cannot pass constitutional muster. *See Cool v. United States*, 409 U.S. 100 (1972). Although these instructions do not

specify an express presumption as to an element of the offense, there remains a risk that the jurors might have erroneously concluded that they had to convict Bosek of some offense, even if a doubt remained as to the reasonableness of his belief or even if some jurors viewed his belief as reasonable and others did not. *See Sandstrom v. Montana*, 442 U.S. 510, 516-17 (1979). Either way, the proper result was acquittal, consistent with the requirement that the State prove all elements of the offense beyond a reasonable doubt. *See Sandstrom*, 442 U.S. at 523-24; *see also Yates v. Evatt*, 111 S.Ct. 1884 (1991); *Francis v. Franklin*, 471 U.S. 307 (1985).

Significantly, the confusion was exacerbated by the court's oral charge to the jury. Although the written instruction stated that the jury should find Bosek not guilty if any one of the elements of first degree murder was not proven (A. 44), the court, in its oral charge, stated:

> "(i)f you find from your consideration of all the evidence that *each* one of these propositions *has* been proved beyond a reasonable doubt, you should find the defendant not guilty"

(C. 1256-57) (emphasis added).

Thus, Bosek's jury was never clearly and correctly told what findings would warrant acquittal.

The appellate court failed to analyze these issues. Rather, the appellate court looked to whether the instructions given accurately stated the law under the new Illinois homicide statutes. Upon concluding that they did, the appellate court found that the instructions were not erroneous. Having reached this conclusion, the appellate court found that the issue was waived (A. 28-30).

Under Illinois law, the failure to tender jury instructions on an issue, or to interpose a contemporaneous ob-

jection at trial to instructions given, waives errors in instructions, unless the error is a substantial defect and the interests of justice require consideration of the issue. Supreme Court Rule 451 (c); *People v. Flowers*, 138 Ill. 2d 218, 232, 561 N.E. 2d 674 (1990). The Illinois courts will apply this exception to the waiver rule when, *inter alia*, the error in instructions might have affected the outcome or where the instructions fail to correctly set forth the State's burden of proof. *See People v. Reddick*, 123 Ill. 2d 184, 526 N.E. 2d 141 (1988); *People v. Daniel*, 191 Ill. App. 3d 837, 844-45, 548 N.E. 2d 354 (1989); *People v. Vincent*, 165 Ill. App. 3d 1023, 1030-31, 520 N.E. 2d 913 (1988). This Court utilizes a similar standard, which allows for review of issues as plain error. *See generally, Lopez v. United States*, 373 U.S. 427, 436 (1963).

Applying these standards, and given the nature of the error in instructions here, consideration of the merits of this issue was warranted. Further, because the appellate court did consider the merits of this issue, in conducting its plain error analysis, this Court could reach the issue as well. *See generally, Connecticut v. Johnson*, 460 U.S. 73, 80 n. 8 (1983) (reviewing, on the merits, an issue which was waived, but which the state courts reviewed on the merits).

The instructions given to the jury here reflect recent changes in the Illinois homicide statutes. Under the new statutory scheme, the defendant has the burden of production, and of persuasion, by a preponderance of the evidence, as to the mitigating factors which would warrant a reduction in the degree of the offense from first, to second, degree murder. Ill. Rev. Stat. ch. 38, § 9-2 (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987); *People v. Shumpert*, 126 Ill. 2d 344, 351-52 (1989). While the new statute still leaves the State with the burden of proving the elements of first degree murder, beyond a reasonable

doubt, the State is no longer required to prove, beyond a reasonable doubt, the absence of the factors in mitigation in order to obtain a conviction for first degree murder. *Shumpert*, 126 Ill. 2d at 351-52. This is a departure from prior Illinois law. *See People v. Ellis*, 107 Ill. App. 3d 603, 610, 437 N.E. 2d 409 (1982). The new statute also provides that the burden of proof, beyond a reasonable doubt, remains on the State with regard to the offense of second degree murder. Ill. Rev. Stat. ch. 38, § 9-2 (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987). This is consistent with case law holding that a defendant may only be convicted of a lesser offense if he or she is proven guilty of all of the elements of that lesser offense. *See Hopper v. Evans*, 456 U.S. 605, 611 (1982); *People v. Fausz*, 95 Ill. 2d 535, 449 N.E. 2d 78 (1983).

The instructions given here, however, do not make it clear that the State retains the burden of proof as to second degree murder.

Further, the instructions given run afoul of this Court's precedents as to when the burden of persuasion may be shifted to the defense.

Like the statutory scheme at issue in *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975), the new Illinois statutes distinguish, in levels of culpability, between those who kill in the presence or absence of a mitigating factor, *i.e.* a genuine but unreasonable belief that the killing is necessary to defend oneself. Ill. Rev. Stat. ch. 38, § 9-1, 9-2 (1987, as amended by P.A. 84-1450, § 2, eff. July 1, 1987). *Mullaney* held that it was constitutionally impermissible for the State, in such a situation, to shift to the defense the burden of proving the mitigating factor.

While other cases have found that other burden-shifting statutes could survive constitutional scrutiny, *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432

U.S. 197 (1977), the *Mullaney* principle has survived. In fact, this Court has considered the *Mullaney* holding to be so important to the goals of reducing the possibility that an innocent person would be convicted and overcoming an aspect of a criminal trial that substantially impaired the truth-seeking process, that the Court has given the *Mullaney* ruling retroactive effect. *Hankerson v. North Carolina*, 432 U.S. 233, 241-44 (1977).

Under *Mullaney*, the instructions given to this jury were constitutionally flawed, as they tended to shift the burden of proof to the defense on the key issue of justification. Under the instructions as given, as noted above, this jury may well have treated the burden as being on the defendant to persuade as to the reasonableness of his belief. If he failed to convince them that his belief was reasonable, this jury may well have concluded that a conviction was required, even if the evidence left a reasonable doubt as to the legitimacy of Bosek's belief.

Significantly, even under those cases in which the challenged statutory scheme shifted the burden of persuasion, the instructions given here would not suffice. In *Martin v. Ohio*, 480 U.S. 228 (1987), this Court expressly noted that the jury, to find guilt of any offense, had to be convinced that none of the evidence raised a reasonable doubt of guilt; further, the Court specifically noted that the jury was instructed that it could acquit if found the presence of an affirmative defense, by a preponderance of the evidence. *Martin*, 480 U.S. at 233. In *Patterson v. New York*, 432 U.S. 197 (1977), the jury instructions "focused emphatically and repeatedly on the prosecution's burden of proving guilt beyond a reasonable doubt." *Patterson*, 432 U.S. at 199-200, 200 n. 5.

The instructions here failed to do either. Bosek's jury was not clearly instructed that it had to acquit if, after considering the proof of mitigation, a reasonable doubt

about the existence of any element remained. This is a different, and far lesser, threshold than proof of the mitigating factor by a preponderance of the evidence. *See Martin*, 480 U.S. at 234.

Under all of these circumstances, the instructions given impermissibly deprived Bosek of the presumption of innocence and relieved the State of its constitutionally required duty to prove each and every element of the offense beyond a reasonable doubt. As the Appellate Court failed to apply the proper standards and failed to remedy this serious constitutional violation, *certiorari* should be granted to review this issue, particularly in light of the impact of the new Illinois homicide statutes.

II.

Bosek's rights to due process and trial by jury were violated when, in a prosecution for murder in which a defense of self-defense was raised, the trial court refused to instruct the jury on the theory of defense relating to the decedent's prior violent and aggressive behavior.

A defendant in a criminal case has an elementary right to present a defense to the trier of fact. *See generally, Herring v. New York*, 422 U.S. 853 (1975).

In this case, Bosek's defense was predicated largely upon evidence of the aggressive behavior and character of the decedent, Lucien Gilbert. Consistent with this position, Bosek's attorney sought to have the jury instructed that:

> "(e)vidence of the victim's aggressive and violent character may be considered by you along with the other facts and circumstances to show who was the aggressor"

(C. 83, 1131-33). This instruction was refused (C. 1131-33).

That instruction was an accurate statement of Illinois law. *See People v. Lynch*, 104 Ill. 2d 194, 199-200, 470

N.E. 2d 1018 (1984); *People v. Buchanan*, 91 Ill. App. 3d 13, 16, 414 N.E. 2d 262 (1980). It also states a principle historically recognized by this Court. *See e.g. Allison v. United States*, 160 U.S. 203 (1895); *Thompson v. United States*, 155 U.S. 271 (1894).

Particularly given the circumstances of this case, the refusal by the trial court to give this instruction deprived Bosek of his due process right to present a defense. Bosek's defense depended upon the reasonableness of his belief that he needed to use deadly force to defend himself. In this regard, Gilbert's violent and aggressive nature was highly relevant, to show both the reasonableness of Bosek's belief and the likelihood that Gilbert, not Bosek, was the aggressor. *See Lynch*, 104 Ill. 2d at 199-200, 470 N.E. 2d 1018. The instruction tendered, on this theory of defense, informed the jury that this was a legitimate matter for their consideration. The trial court's refusal to give the instruction thus tended to deprive Bosek of this theory of defense.

In this case, it was essential to the defense that the jury be clearly and distinctly advised of the use it could make of this evidence, given the critical nature of the evidence of Gilbert's character to the defense position. *Cf Allison*, 160 U.S. at 216. Further, the instruction held even greater importance in light of the instructions given, over defense objection, which tended to suggest that Bosek was the initial aggressor and which, consequently, limited the availability to him of a justification defense (C. 74-75, 103-06). Illinois Pattern Jury Instructions, Criminal Nos. 24-25.09, 24-25.11 (2d ed. 1981). The question of who was the aggressor was clearly in issue; the instruction tendered by the defense legitimately would have placed additional facts necessary for resolution of this issue before the jury.

III.

The State failed to eliminate all reasonable doubt of Bosek's guilt.

As noted above, the defendant in a criminal case has a fundamental constitutional right not to be convicted unless the prosecution proves him or her guilty beyond a reasonable doubt, on each and every element of the offense charged. *In re Winship*, 397 U.S. 358 (1970).

When a defendant raises a defense of justification, such as self-defense, in a prosecution for murder, the reasonableness of the defendant's conduct cannot be judged according to a standard of calm, detached reflection; rather, the reasonableness of the defendant's conduct must be assessed based on the circumstances confronting the defendant at the time of the homicide. *See Brown v. United States*, 256 U.S. 335 (1921); *see generally People v. Scott*, 97 Ill. App. 3d 899, 902-03, 424 N.E. 2d 70 (1981).

The facts of this case have been detailed in the Statement of the Case. In summary, those facts demonstrate that Bosek was confronted with an aggressive and violent man, who had threatened Bosek, and his son, before. Gilbert typically carried weapons. Bosek feared Gilbert. Upon seeing Bosek drive toward him, Gilbert got out of his car and was headed for an AK-47, a very powerful, semi-automatic rifle. For all Bosek knew, the rifle may well have been in an automatic mode, and, thus, the "machine gun", which Bosek perceived it to be. Gilbert was holding, or at least reaching for, this rifle, at the time of the first shot.

At the time of the second shots, Bosek had seen Gilbert moving his right arm toward the AK-47, which was across his legs. Bosek would have had no way of knowing that Gilbert would not have been able to reach the rifle, and Bosek reacted, in seconds, to the danger which he perceived.

Under these circumstances, it cannot be said that the State eliminated all reasonable doubt of guilt, and Bosek's conviction should have been reversed by the Appellate Court, consistent with the principles of *Winship*. The Appellate Court erroneously looked to what Gilbert actually could have done, not to Bosek's perception, and disregarded the fact that Gilbert was reaching for this highly dangerous weapon (A. 31). The Appellate Court thus failed to afford Bosek the protection of the standard of proof beyond a reasonable doubt.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner, Norman Bosek, respectfully requests that this Honorable Court grant *certiorari* to review the decision of the Illinois Appellate Court, Second District, and the denial, by the Illinois Supreme Court, of the petition for leave to appeal, and, upon such review, reverse his conviction or, in the alternative, reverse his conviction and remand for a new trial.

Respectfully submitted,

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